NO. 81-2275

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IN THE

Supreme Court of the United States

OCTOBER TERM 1981

JOHN C. CARDIN,
Petitioner,

v.

JOSEPH B. DE LA CRUZ, THE HON. CAROL BURGETT, SANDY WELLS, OLIVER MASON, HAZEL OBI, JAMES HARP, GUY MCMINDS, PEARL BALLER, WARREN SHALE, MAX HUDSON, LAWRENCE HALL, PHILLIP MARTIN GERALD ELLIS, THE BUSINESS COMMITTEE OF THE QUINAULT INDIAN NATION, THE QUINAULT TRIBAL COURT,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONSE TO PETITION FOR CERTIORARI

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ABCD AT CRAFTSMAN PRESS, SEATTLE

Questions Presented

1. Petitioner's Questions 1 and 2 pose a single question: Whether an on-reservation business in an Indian fishing village selling food to Indians that is exposed to potential rodent contamination, that invites Indians to do business in a wooden store that is a fire hazard, that keeps unlocked, abandoned refrigerators in open areas where children play, and that maintains a garbage dump in the village may claim an absolute immunity from tribal government civil regulations protecting the health and safety of the Indian community because that business is operated on reservation fee land by a non-Indian?

2. May Petitioner's Question 3(1) be raised for the first time in this Court when the issue of approval by the Secretary of Interior of the Quinault Constitution and laws was not pleaded, raised, or considered in either Court below?

3. May Petitioner's Question 3(2) be raised for the first time in this Court when in both Courts below, notwithstanding uncontroverted record evidence that Petitioner's business conduct directly threatened the health, safety and economy of the Indian fishing community of Queets, Petitioner relied on an absolute claim of immunity to tribal civil jurisdiction regardless of the facts?

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JOHN C. CARDIN,

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v.

JOSEPH B. DELACRUZ, ET AL.,

RESPONDENTS

Respondents' Brief in Opposition

The respondents, tribal government officers of the Quinault Indian Nation, urge this Court to deny review of the judgment below, reported at 671 F.2d 363.

Statement of the Case

The Indian fishing village of Queets is located within the Quinault Reservation in a remote part of the

Olympic Peninsula on the Coast of Washington State. The village population is 250 Indians and 20 non-Indians (approximately 92% Indian). Pet. at 102a. This village is located at the ancestral fishing grounds of the Queets Band of Indians at the mouth of the Queets River.

The Quinault Indian Nation (the Tribe) enforces reasonable, nondiscriminatory civil health and safety laws for the protection of the Indian village of Queets. These regulations are applicable to all businesses selling food to Indians, whether Indian owned or not. Petitioner claims an absolute immunity from such regulations in his business of selling food and other products to the Indians of Queets.

A neutral summary of the core facts in this case is found in the Magistrate's report, reprinted at Pet. 101a-105a. These uncontroverted findings of fact were not objected to by any party and were not

disturbed by the District Court or the Court of Appeals. Uncontroverted facts of record and all facts alleged by the Respondents must be accepted as true since the District Court ruled that Petitioner was absolutely immune to tribal civil jurisdiction as a matter of law.

In 1978, at the request of Petitioner's predecessor in interest, the Queets Store was inspected by the tribal building inspector. Applying the national standards of the Uniform Building Code, 20 violations were identified.—/ After Petitioner

—/ Both the Quinault Indian Nation and the State of Washington have adopted the Uniform Building Code. Petitioner conceded that the State had never enforced its code at his store. Enforcement of the state code is the responsibility of the various counties. That the state code was never enforced as to Petitioner may be explained by the fact that the reservation Indian community of Queets is located in an appendage to Jefferson County separated from the county seat in Port Townsend by the wilderness expanse of the Olympic National Park and by 160 miles of road, mostly through adjacent Clallam County.

acquired the Store, he attended the October 10, 1978 meeting of the Quinault Business Committee (tribal council). Petitioner said he was aware of the Store's building code problems, that he was interested in working with the Tribe, and his belief that six months would afford him adequate time to complete the repairs. The Quinault Business Committee granted Petitioner six months to complete repairs.[1]

More than six months later, in May of 1979, Petitioner opened the Store without completing these repairs. Some of the

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[1] Non-Indians participate in many aspects of Quinault tribal political affairs, including service on juries in Tribal Court, as members of the Tribal Planning Commission, on employee personnel grievance committees, and in executive and advisory position of tribal business enterprises. Non-Indians also are provided a number of tribal government services, including police and fire protection, garbage collection, television transmission, sewage disposal, social services, alcoholism and health related programs, adult education classes, ambulance service, and water procurement and distribution. CR 11, DeLaCruz Aff.

Store's continuing deficiencies created a fire hazard and exposed food kept there to rodent contamination. 671 F.2d at 364 n.1.

On June 11, 1979, the Business Committee advised Petitioner he could get a temporary permit to operate the Store if he could agree to a timetable to complete repairs. Petitioner rejected the Tribe's offer and continued to operate the Store.

The Tribe then obtained an injunction in Tribal Court ordering Petitioner to close the Store.—/ Appellee refused to obey the court order and tribal police closed his store. Four days later,

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—/ Petitioner's Brief, at 6, erroneously asserts that Petitioner never attended any Tribal Court hearing. The Tribal Court's Order of June 12, 1979 establishes that Petitioner was notified of and in fact appeared in that Court proceeding. CR 12, Attachment 1, at 32. Petitioner refused to participate in the Tribal Court hearing on April 11, 1980. Pet. at 95a; 104a-105a 671 F.2d at 365.

Petitioner obtained a 30-day temporary certificate of occupancy from the Tribe to reopen his store and the Tribal Court then dissolved its injunction . Again he did not make the repairs and improvements the Tribe wanted. In September 1979 the Tribe sued in Tribal Court to require correction of these deficiencies or closure of the Store. 671 F.2d at 365.

On October 10, 1979 Petitioner was advised by the Tribe that several unlocked, abandoned refrigerators in open areas on his property constituted a threat to the lives of children who play in the area and that the open garbage dump, scrap wood, tires, washers, dryers, abandoned stoves and other materials scattered around Petitioner's property created risks of fire, disease and other injury that jeopardized the safety of the Indian community. Pet. at 103a-104a.

Petitioner filed this action to enjoin

tribal officers from regulating the effects of his business on the Indian community. Petitioner did not assert that the tribal regulations were unnecessary, unreasonable, or unevenly applied. Instead, Petitioner asserted that he was subject exclusively to state regulation. However, Petitioner conceded that the State had done nothing to enforce any building and safety laws to remedy dangerous conditions created by Petitioner. Petitioner also conceded that he had never requested State authorities to inspect his property until instructed to do so by his attorney in this case. Even then, he conceded, the State took no action. There is, therefore, no conflict with state law here. The Quinault Indian Nation only seeks to protect the health, safety and economy of the Indian community of Queets.

Summary of Argument

1. The Court of Appeals' decision is fully consistent with the decisions of

this Court.

2. This case fits well within the existing tests for the proper exercise of tribal government authority.

3. The Quinault Nation has a substantial interest in protecting the health, safety and economy of the on-reservation Indian village of Queets.

4. On-reservation businesses which voluntarily sell potentially contaminated food to Indians and which jeopardize the health, safety and economy of the Indian village of Queets are subject to reasonable tribal civil regulations applicable to all such businesses, whether Indian or non-Indian owned.

5. Under the compelling factual circumstances of this case, the exercise of evenhanded tribal civil regulatory authority was justified by paramount federal and tribal interests.

6. The uncontroverted factual

circumstances of this case involving commercial dealings between an on-reservation retail food supplier and reservation Indians, and conduct within an Indian village by a non-Indian business threatening the economy, health and safety of the Indian community are unique. The fact-specific decision of the Court below does not conflict with the decisions of any other circuit court.

7. Questions not raised or considered by the Court of Appeals should not be reviewed for the first time in this Court.

Argument

Decisions of This Court Establish the Legal Standard Applied By The Court of Appeals.

This Court's decisions confirm the existence of tribal civil jurisdiction to regulate on-reservation commercial transactions with Indians and to protect the health, safety, and economy of established Indian communities. Montana v. United

States, 450 U.S. 544, 565-566 (1981); Washington v. Confederated Colville Tribes, 447 U.S. 134, 153 (1980); McClanahan v. Arizona Tax Commission, 411 U.S. 164, 179 (1973); Williams v. Lee, 358 U.S. 217 (1959) The Court of Appeals faithfully applied these principles to a reservation food business in an Indian village engaged in commercial dealings with Indians and operating with disregard for the health and safety of its Indian customers and neighbor

The Court of Appeals carefully applied principles established in previous decisions of this Court. The Court of Appeals stated that "that the dependent status of Indian tribes has implicitly divested them of power to regulate, in general," 671 F.2d at 366 (emphasis by Court of Appeals), non-Indian activities which bear "no clear relationship to tribal self-government or internal relations." Montana v. United States, 450 U.S. at

564.

The Court of Appeals added that "the Montana decision acknowledged that Indian tribes have retained the power to impose certain kinds of regulations on the activities of a non-member on fee lands within their reservations." 671 F.2d at 366. The Court of Appeals recognized two categories identified by this Court in Montana as justifying the exercise of tribal civil jurisdiction. Id.

First, "A tribe may regulate through taxation, licensing, or other means, the activities of nonmembers who enter consensual relations with the tribe or its members, through commercial dealings, contracts, leases, or other arrangements." Montana v. United States, 450 U.S. at 565. In this case, the record shows that Petitioner invites Indians into a commercial building in order to sell them food and other products. In addition, Petitioner's

predecessor in interest invited tribal inspection of building conditions at the Queets Store and promised to repair deficiencies; deficiencies which Petitioner himself acknowledged at the October 10, 1978 meeting of the Quinault Business Committee when he stated his interest in working with the Tribe and gave his assurance that six months would afford him adequate time to complete repairs. Thus, there are commercial relations between Petitioner and tribal members as well as consensual relations with the Tribe upon which to base the exercise of tribal civil jurisdiction.

Second, this Court said in Montana that "A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the

health or welfare of the tribe." 450 U.S. at 566. The conduct Petitioner asserts a right to engage in jeopardizes these tribal interests in several ways. Pet. at 103a-104a.

Petitioner is inviting Indians into a building that is a fire hazard. One of the building's deficiencies permits the accumulation of fire fuels under the floor of this old wooden building. Such a fire threatens not only those who enter the Store at Petitioner's invitation but also the safety and property of Indians remaining in their own homes to which a fire starting on Petitioner's property might spread. Likewise, the safety of Indians who respond to put out fires in the village is endangered.

Petitioner also asserts that he has a right to offer for sale food that is exposed to possible rodent contamination due to his failure to comply with Building

Code criteria. Indian families consuming contaminated food in their own homes would suffer illness or disease which would then be complicated by the isolated location of the village and its distance from medical facilites, with resulting delay in treatment. Medical and transportation costs as well as earnings lost during such sickness would impose economic burdens on impoverished Indian families and tribal government social services agencies.

Petitioner also has collected abandoned, unlocked refrigerators in open areas around his property. The record includes several photographs showing children playing around them. These attractive nuisances are the very jaws of death waiting to swallow unsuspecting children.

Petitioner also maintains an open garbage dump on his property in Queets. This nuisance provides a breeding place from which rodents and other organisms may

spread disease to Petitioner's Indian neighbors. Other dangerous and combustible materials collected around Petitioner's property threaten to cause personal injury, fire, and damage to Indians and their property.

The Decision Below Accommodates Both Tribal and State Interests

This Court has not applied "mechanical or absolute conceptions of state or tribal sovereignty" in cases involving the exercise of tribal civil regulatory jurisdiction over on-reservation activities of non-Indians. White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 145 (1980). Instead, the Court has required a particularized inquiry into the nature of the federal, tribal and state interests at stake. Ramah Navajo School Board, Inc., v. Bureau of Revenue, 50 U.S.L.E. 5101, 5102 (July 2, 1972). That inquiry is made easier in this case not only because criti-

cally important federal and tribal intersts are at stake, but also because the Tribe does not contest the exercise of concurrent state jurisdiction over Petitioner.

Significant federal interests require tribal protection of the health and safety of reservation Indian communities. Minutes of the Treaty negotiations between the United States and the Quinaults and other tribes show that Governor Stevens, who negotiated the Treaty for the United States, urged agreement to the Treaty, 12 Stats. 971, so that the Quinaults would have a "permanent home where we can prevent bad white men from injuring you." Report on the Source, Nature, and Extent of the Fishing, Hunting, and Miscellaneous Related Rights of Certain Indian Tribes in Washington and Oregon at 356 (U.S. Dept. of Interior 1942). Governor Stevens assured that agreement to the Treaty would provide Indians with "a place where you

cannot be driven off." Id. at 365. Implicit in the Treaty's guarantee of a permanent tribal homeland and federal protection was that jurisdiction over reservation affairs affecting Indians remained in the tribal government. Williams v. Lee, 358 U.S. at 221-223. This tradition of Indian sovereignty "is reflected and encouraged in a number of congressional enactments demonstrating a firm federal policy of promoting tribal self-sufficiency and economic development." White Mountain Apache Tribe v. Bracker, 448 U.S. at 143. E.g., Indian Health Care Improvement Act, 25 U.S.C. §1601. Decisions of this Court and the widely held understanding within the federal government confirm that Indian tribes retain a broad measure of jurisdiction over non-Indian activities on Indian reservation lands in which the tribes have a significant interst. Washington v. Confederated Colville Tribes, 447 U.S. at

152-153. Consistent with these overriding federal interests, tribal governments may exercise civil jurisdiction to regulate non-Indian business activities on Indian reservation fee land which threaten the economy, health or welfare of reservation Indian communities. Montana v. United States, 450 U.S. at 565-566.

The Brief of the United States of America as Amicus Curiae, at 5, in the Court of Appeals states:

> In the instant case, the federal interest is fully supportive of the exercise of tribal authority by the Quinault Indians. Congress and the courts have repeatedly affirmed that "well-established federal 'policy of furthering Indian self-government.'" Santa Clara Pueblo [v. Martinez, 436 U.S. 49, 62 (1978)]. Enforcement of health and safety regulations has been viewed throughout our nations's history as central to the sovereignty of a government. See, e.g. Mintz v. Baldwin, 289 U.S. 384 (1933). The unwillingness of the Cardins to conform to the Quinault tribe's building code poses grave dangers to the health and safety of nearby residents and store customers. Fire and food contamination are two of the most bla-

> tant hazards caused by the Cardins' indifference to twentieth century building standards. And yet, despite these dangers, the Washington State government never attempted to enforce the State building code at the Cardins' property. It is clear, then, that the Quinault's exercise of self-government is crucial to the fulfillment of the federal desire that Indian tribes, through the upgrading of their government, escape from "a century of oppression and paternalism." Mescalero Apache Tribe v. Jones, 411 U.S. 145, 152 1973)....

There can be no doubt that "essential tribal relations" in an existing Indian village are "jeopardized" by business practices involving sales of potentially contaminated food, operation of a store with fire hazards, keeping unlocked refrigerators where children play, and maintaining an open garbage dump in a village. Williams v. Lee, 358 U.S. at 219. Fundamental tribal governmental interests in the health, safety and economy of reservation Indian communities are threatened by such conduct Montana v. United States, 450

U.S. at 565-566.

The Respondents have not contested State concurrent jurisdiction over Petitioner. Thus, although the State in fact has not taken any enforcement action as to Petitioner, it remains free to do so.

In McClanahan v. Arizona Tax Commission, 411 U.S. 164 179 (1973), this Court noted that both the tribe and the state often may claim an interest in asserting their respective jurisdictions in regard to non-Indian activities on the reservation. Absolute, "automatic exemptions" in such cases"are unusual". White Mountain Apache Tribe v. Bracker, 448 U.S. at 144. Where there is no direct conflict, each government is free to impose its regulations without ousting the other. Washington v. Confederated Colville Tribes, 447 U.S. at 158-159.

Paramount federal and tribal interests in the health, safety, and economy of the

Indian community of Queets amply justify the tribal regulations in this case. Since the state also is free to regulate Petitioner, the decision below gives adequate room for state interests.

There Is No Conflict In The Circuits

Decisions of this Court establish the law about when a tribe may exercise civil jurisdiction over non-Indians. Cases applying that law are highly fact specific, turning on the level of legitimate tribal interests in protecting health and safety in the Indian community. None of the other lower court cases discussed by Petitioner involve either the sale of potentially contaminated food to Indians in an Indian village or the other facts which make the Quinault Tribe's interest in these regulations unique. Thus, even if those other cases did not correctly apply the law about the proper exercise of tribal juris-

diction, they are distinguishable on their facts and provide no basis for reviewing the present case.

Prior Decisions Of This Court Foreclose Petitioner's Constitutional Claim

Petitioner asserts that unspecific constitutional problems exist if non-members are subject to tribal civil jurisdiction. That argument, as the Court of Appeals recognized, 671 F.2d at 367, has been rejected by this Court on several occasions. Merrion v. Jicarilla Apache Tribe, 102 S.Ct. 894, 906-907 (1982); United States v. Mazurie, 419 U.S. 544, 557-58 (1975); Williams v. Lee, 358 U.S. 217, 223 (1959).

In any event, a federal court could enjoin enforcement of tribal civil regulations which did not protect important tribal interests. Federal courts, thus can adequately protect non-Indians when their activities do not jeopardize tribal inter-

ests.

Questions May Not Be Raised For The First Time In This Court

For the first time in this case, the Petitioner asserts that the exercise of retained, inherent tribal civil jurisdiction by the Quinault Nation is invalid without approval of the Quinault Constitution and laws by the Secretary of Interior.

This issue was not raised or argued in the Court of Appeals,[1] nor was it

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[1] That Question 3(1) is being raised for the first time in this Court can been seen from Petitioner's own statement of the Questions Presented in his Court of Appeals Brief, at iv:

> 1. Is a non-Indian who is not a tribal member, residing and doing business upon fee-patent property, subject to the civil jurisdiction of an Indian tribal court?
>
> 2. Does the United States Supreme Court's decision in Oliphant v. Suquamish Tribe declare non-existent all judicial power of Indian tribal courts over non-Indians?
>
> 3. Does the Indian General Allotment Act of 1887 limit the territory over which Indian tribal courts (cont'd)

pleaded in the District Court. Complaint, CR1 and 35. The rule against considering issues raised for the first time in this Court is intended to prevent sandbagging and the difficulty of deciding issues where there was no opportunity to present evidence or argument in the District Court or Court of Appeals. "Where issues are neither raised before nor considered by the Court of Appeals, this Court ordinarily will not consider them". Adickes v. Kress Co., 398 U.S. 144, 147 n.2 (1970). See also, Tennessee v. Dunlap, 426 U.S. 312, 314 n.2 (1976); United States v. Ortiz, 422 U.S. 891, 898 (1975); Lawn v.

__/(cont'd from page 22)
over non-Indians?

3. Does the Indian General Allotment Act of 1887 limit the territory over which Indian tribal courts may assert judicial power?

4. Is judicial power over non-Indians outside the scope of the internal self government arena of tribal regulatory authority?

United States, 355 U.S. 339, 362-63 n.16 (1958).

Similarly, Question 3(2) was not raised or considered in the Court of Appeals nor was it pleaded in the District Court. Indeed, both in the District Court and Court of Appeals Petitioner claimed an absolute immunity from tribal civil jurisdiction. Consistent with that singular claim of immunity, Petitioner did not controvert the record evidence establishing that he was offering for sale to Indians food that was exposed to rodent contamination, that his store is a fire hazard, that he keeps unlocked refrigerators in areas where children play, or that he maintains an open garbage dump in an Indian village. See Magistrate's Findings, Pet. 103a-104a. In fact, it was the very basis of Petitioner's claim in both Courts below that he had an absolute right to do

these things. Based on the uncontroverted record and Petitioner's own claims, the Court of Appeals applied standards of this Court and narrowly held that the Quinault Tribe could protect the health, safety and economy of the Indian community of Queets from threats appearing of record. Since Petitioner broadly claimed that the Quinault Nation could not protect even these interests, he did not present Question 3(2) to either court below and that question should not be considered for the first time in this Court.

Should this Court grant the writ, therefore, it should be limited to Question 1 or 2.

Conclusion

The Court of Appeals faithfully applied decisions of this Court regarding the proper exercise of tribal civil jurisdiction. The writ should be denied.

Respectfully submitted,

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MPO:mjl